Supreme Court, U.S.
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No.

In the Supreme Court of the United States

TOWNSHIP OF ANN ARBOR; ANN ARBOR TOWNSHIP ZONING OFFICIAL; ANN ARBOR TOWNSHIP ZONING BOARD OF APPEALS,

Petitioners,

v.

TIM DiLAURA; DF LAND DEVELOPMENT L.L.C; APOSTOLATE FOR THE EUCHARISTIC LIFE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Three Circuit Courts of Appeals have ruled that a judgment does not confer prevailing party status if it does not award some type of enforceable relief. The Sixth Circuit in this case has ruled otherwise. Does a judgment that does not award plaintiffs money damages, injunctive relief, or declaratory relief qualify plaintiffs as prevailing parties entitled to an award of attorney fees under 42 U.S.C. § 1988?

2. May an appellate court base its decision regarding prevailing party status on comments by the district court, instead of the unambiguous terms of the judgment at issue?

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STATEMENT OF JURISDICTION

The Sixth Circuit issued its opinion on December 27, 2006. The Sixth Circuit entered its order denying rehearing and rehearing en banc on June 12, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

This case involves 42 U.S.C. § 1988 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. The pertinent provisions are reproduced at Pet. App. 60a.

STATEMENT OF THE CASE

1. District Court Jurisdiction.

The court of first instance, the United States District Court for the Eastern District of Michigan, had jurisdiction over this matter under 28 U.S.C. § 1331.

2. Factual Background.

Plaintiffs Tim DiLaura, DF Land Development LLC and Apostolate for the Eucharist Life proposed to use a house on Dixboro Road in Ann Arbor Township (the "Dixboro Road Property") as a retreat house. After defendant Ann Arbor Township Zoning Board of Appeals denied plaintiff's request for a zoning variance, plaintiffs filed suit against defendants Ann Arbor Township, Ann Arbor Township Zoning Official and Ann Arbor Township Zoning Board of Appeals (collectively, "the Township") in the Circuit Court for the County of Washtenaw, Michigan. Plaintiffs asserted various claims under the Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (the "RFRA"), alleging that the Township interfered with their exercise of religion by denying the request for a variance to use the Dixboro Road Property as a retreat house.

The Township removed the case to the Eastern District of Michigan and moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction.

On April 3, 2000, the district court granted the Township's motion and dismissed the case, holding that plaintiffs lacked standing. Plaintiffs' motion for reconsideration was denied. Plaintiffs appealed and the Sixth Circuit reversed in part and remanded the case. *DiLaura v. Ann Arbor Charter Township*, 30 Fed. Appx. 501; 2002 U.S. App. LEXIS 3135 (6th Cir. February 25, 2002). The Sixth Circuit affirmed the dismissal of plaintiffs' free exercise claims. The court held, however, that plaintiffs on remand could assert a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, which was enacted while the appeal was pending.

On remand, plaintiffs filed an amended complaint asserting an RLUIPA claim. Subsequently, the Township's board, as the district court suggested at a scheduling conference, adopted a resolution approving the issuance of a conditional use permit for DiLaura to house overnight guests at the Dixboro Road Property. [Resolution (Dkt. 41, Response Brief, Ex. 6), Pet. App. pg. 55a]. The resolution found that DiLaura's proposed use qualified as a bed and breakfast under the Township zoning ordinance because the Dixboro Road Property would be used "for housing of no more than 6 transient overnight guests with sufficient off street parking, bathing facilities, and simple food service provided from the residential kitchen." [*Id.* pg. 56a]. Accordingly, DiLaura was free to operate the retreat house in every respect that he first proposed to the Township.

Unsatisfied with the conditional use permit, plaintiffs moved for summary judgment of their RLUIPA claim. The Township responded to plaintiffs' motion and filed a cross-motion for summary judgment. On April 9, 2003, the district court heard arguments on the parties' motions. [Transcript, Pet. App. pg. 22a].

The court stated during the hearing that it did not believe the Township had substantially burdened plaintiff's exercise of religion, but also that the label "bed and breakfast" did not properly characterize plaintiffs' proposed property use. "But I don't think there's a substantial burden, but I don't think the bed and breakfast is a fair characterization for what happened." [*Id.* pg. 44a].

Although the Township informed the court that there was no requirement that overnight guests at the retreat house make any payment to plaintiffs, the court ruled that the Township substantially burdened plaintiffs' religious exercise "[b]y

labeling [the retreat] as a bed and breakfast and the fact that you have to have payment in return." [*Id.* pg. 46a]. The court then acknowledged that granting summary judgment in plaintiffs' favor was purely technical: "As I say I'm not sure I'm doing them a favor because if I grant their motion for summary judgment, it doesn't put them anywhere anyhow." [*Id.* pg. 45a].

The district court rejected plaintiffs' request for injunctive relief:

> I'm not going to give you any kind of injunction. All I'm going to do at this point—I guess they can continue to do it until the Township comes up with another ordinance.
>
> . . . .
>
> I'm not—the reason I'm not going to issue an injunction because the relief that you're asking for in effect is them not enforcing their ordinance. I'm going to grant that. That's your motion for summary judgment.

[*Id.* pgs. 46a-47a].

The district court's order granting summary judgment was a single page order as follows:

> On April 9, 2003, the plaintiffs' and the defendants' motions for summary judgment came before the Court. A hearing was held and oral arguments were heard. For the reasons stated on the record, and in accordance with the terms stated on the record,

> IT IS ORDERED that the plaintiffs' motion for summary judgment is granted.
>
> IT IS FURTHER ORDERED that the defendants' motion for summary judgment is denied.

[Order, Pet. App. pg. 51a].

The district court's judgment did not grant plaintiffs relief:

> The court has issued an order granting the plaintiffs' motion for summary judgment.
>
> Accordingly,
>
> IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants. Costs to be permitted in accordance with law.

[Judgment, Pet. App. pg. 53a].

Plaintiffs filed a motion for attorney fees under 42 U.S.C. § 1988, asserting that they were "prevailing parties" on their RLUIPA claim. The Township then timely appealed the district court's judgment, and as a result, plaintiffs' motion for attorney fees was stayed.

On October 6, 2004, the Sixth Circuit in an unpublished opinion affirmed the district court's judgment. *See DiLaura v. Ann Arbor Charter Township*, 112 Fed. Appx. 445; 2004 U.S. App. LEXIS 21159 (6th Cir. October 6, 2004).

Plaintiffs then renewed their motion for attorneys' fees, which was referred to a magistrate judge. On March 24,

2005, the magistrate judge issued a Report and Recommendation recommending that the district court award plaintiffs over $178,000 in fees, the full amount requested. [Opinion and Order, Pet. App. pg. 18a]. The Township objected to that recommendation.

On September 28, 2005, the district court entered its Opinion and Order Accepting in Part and Rejecting in Part Magistrate Judge's Report and Recommendation Regarding Plaintiff's Motion for Costs and Attorney Fees. [*Id*, pg. 17a]. On the same date, the district court entered a Judgment awarding plaintiffs costs and attorney fees in the amount of $72,214.24. [Judgment, Pet. App. pg. 21a]. Although the district court "agree[d] with the magistrate judge's conclusion that plaintiffs are prevailing parties within the meaning of 42 U.S.C. § 1988(b)," the court also "disagree[d] with the magistrate judge's conclusions that plaintiffs in this lawsuit 'received exactly what they sought'. . . ." [Opinion and Order, Pet. App. pg. 18a]. The district court noted that "While plaintiffs did succeed in obtaining a ruling that defendants violated their rights under [RLUIPA], they did not prevail on *any* of their other claims and they did not obtain *any* other relief." [*Id.*, pg. 18a (emphasis in original)].

The district court explained that "In the present case, plaintiffs' success was 'partial or limited' indeed. None of the claims initially pled succeeded and none of the relief initially sought was obtained." [*Id.*, pg. 20a]. Plaintiffs obtained summary judgment for their RLUIPA count only, but "no declaratory or injunctive relief was awarded." [*Id.*, pg. 20a].

Plaintiffs appealed the district court's reduction of the amount of fees the magistrate judge had recommended. The

Township cross-appealed the district court's determination that plaintiffs were prevailing parties under 42 U.S.C. § 1988.

In a published opinion, the Sixth Circuit affirmed the district court's ruling that plaintiffs were prevailing parties under Section 1988. *DiLaura v. Ann Arbor Charter Township*, 471 F.3d 666 (6th Cir. 2006), reh. denied, 2007 U.S. App. LEXIS 15263 (6th Cir. June 12, 2007). The court based its decision not on the terms of the district court's judgment, but rather on statements the district court made at the summary judgment hearing:

> While acknowledging that the defendants were not going to enforce the bed and breakfast provisions at the present time, the district court stated that it had "to look at what [the bed and breakfast ordinance] says and take it [as] exactly what [the defendants] could do." Joint Appendix ("J.A.") at 838 (Mot. Hr'g on Cross-Mot. for Summ. J. ("Hr'g") at 27). The district court did not formally grant an injunction, but, rather, *stated on the record* that the defendants could never enforce the bed and breakfast provisions against the plaintiffs.

471 F.3d at 669 (emphasis added) [Pet. App. pg. 7a].

The Sixth Circuit premised its entire prevailing party analysis, and subjected the Township to attorney fee liability, solely on the district court's remarks in the transcript:

> Here, the district court granted the plaintiffs' motion for summary judgment, and stated *on the record* that the defendants could not enforce their ordinance against the plaintiffs' proposed use of the property. The *district court explained that it was not granting an*

> *injunction* because "the relief [the plaintiffs were] asking for in effect is [the defendants] not enforcing their ordinance. I'm going to grant that. That's your motion for summary judgment." J.A. at 836 (Hr'g at 25). While the district court *declined to label the relief "injunctive,"* the effect of its order granting summary judgment materially affected the legal relationship between the parties in that after the district court's judgment was rendered, the threat of enforcement no longer existed. The plaintiffs' victory was not merely technical or symbolic, and the district court's determination that the plaintiffs were prevailing parties was not clearly erroneous.

Id. at 671 (emphasis added) [Pet. App. pgs. 11a-12a].

The Sixth Circuit also reversed the district court's reduction of the fee recommended by the magistrate judge, after finding that plaintiffs obtained "complete" relief. *Id* at 671 [Pet. App. pg. 12a].

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit's Analysis Significantly Departs from this Court's Standard for Prevailing Party Status.

This Court has strictly construed statutory fee-shifting exceptions to the American rule that requires parties to pay their own legal fees. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602; 121 S. Ct. 1835; 149 L. Ed. 2d 855 (2001) ("Under this 'American Rule,' we follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.'" quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819; 114 S. Ct. 1960; 128 L. Ed. 2d 797 (1994)).

Although 42 U.S.C. § 1988 allows fee awards to prevailing parties, "Section 1988 is not 'a relief Act for lawyers.' Instead, it is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Farrar v. Hobby*, 506 U.S. 103, 122; 113 S. Ct. 566; 121 L. Ed. 2d 494 (1992) (O'Connor, J., concurring) quoting *Riverside v. Rivera*, 477 U.S. 561, 588; 106 S. Ct. 2686; 91 L. Ed. 2d 466 (1986) (Rehnquist, J., dissenting).

This Court has addressed the prevailing party issue several times in the last 20 years, describing the type of relief a party must obtain in order to recover fees under Section 1988 and similar fee shifting statutes. *See, e.g., Hewitt v. Helms*, 482 U.S. 755; 107 S. Ct. 2672; 96 L. Ed. 2d 654 (1987); *Rhodes v. Stewart*, 488 U.S. 1; 109 S. Ct. 202; 102 L. Ed. 2d 1 (1988); *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792; 109 S. Ct. 1486; 103 L. Ed. 2d 866 (1989); *Farrar, supra*; *Buckhannon, supra; Sole v. Wyner*, 551 U.S. ___; 127 S. Ct. 2188; 167 L. Ed. 2d 1069 (2007). Through these cases, the Court has established the threshold requirements for prevailing party status. The Sixth Circuit decision contradicts this Court's prevailing party limitations.

The formulation in *Farrar, supra,* made clear that only an enforceable judgment, consent decree, or settlement confers prevailing party status:

> To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, "the moral satisfaction [that] results from

> any favorable statement of law" cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

Farrar, 506 U.S. at 112-113.

Buckhannon confirmed the rule in *Farrar* that only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon,* 532 U.S. at 604. *Buckhannon* rejected the "catalyst theory" that had recognized an opponent's voluntary conduct as the basis of a prevailing party determination. After *Buckhannon*, in order for a party to be a "prevailing party," there must be a "judicially sanctioned change in the relationship of the parties." *Id.* at 605.

It is insufficient that plaintiffs have achieved the land use they sought. Under *Buckhannon* and *Farrar*, a plaintiff's failure to obtain an injunction or other enforceable relief contained in the terms of a judgment precludes prevailing party status. Recently, this Court in *Wyner*, *supra*, ruled that a plaintiff who obtained a preliminary injunction but was not granted permanent injunctive relief was not a prevailing party. Plaintiffs' situation here is not unlike that of plaintiff in *Wyner*: plaintiffs arguably achieved the goal of the litigation, but were not granted permanent injunctive relief. *Wyner* ruled that such a result did not entitle a plaintiff to fees under 42 U.S.C. § 1988:

> Wyner, on the other hand, urges that despite the denial of a permanent injunction, she got precisely

> what she wanted when she commenced this litigation: permission to create the nude peace symbol without state inference. That fleeting success, however, did not establish that she had prevailed on the gravaman of her plea for injunctive relief, *i.e.*, her charge that the state officials had denied her and other participants in the peace symbol display "the right to engage in constitutionally protective expressive activities."

Wyner, 127 S. Ct. at 2195.

To be sure, *Wyner* addressed whether the fleeting success of a preliminary injunction later vacated by a ruling on the merits provided sufficient grounds to confer prevailing party status. This case is analogous to *Wyner*, however, in that plaintiff here relies on comments by the district court during oral argument that the Township could not enforce its zoning ordinance, but the resulting judgment did not grant permanent injunctive or other relief.

Obvious examples of enforceable relief are money judgment, injunction, declaratory judgment, and consent judgment. The Seventh Circuit has also ruled that under *Buckhannon*, settlements incorporated in orders of dismissal will also suffice to confer prevailing party status. *See, e.g. Gautreaux v. Chi. Hous. Auth.*, 491 F.3d 649, __; 2007 U.S. App. LEXIS 15158 at *14 (7th Cir. June 26, 2007) ("Following this logic, we have held that cases in which 'the terms of the settlement were incorporated into the dismissal order and the order was signed by the court rather than the parties, or the order provided that the court would retain jurisdiction to enforce the terms of the settlement,' have a sufficient judicial imprimatur to entitle the plaintiff to prevailing-party status."). None of these examples, however, matches the judgment entered in this case. The Sixth Circuit's

decision, therefore, is contrary to this Court's prevailing party jurisprudence.

2. The Circuits are Divided on this Important Issue.

Unlike the Sixth Circuit, the Eighth Circuit ruled that an order granting summary judgment but no enforceable relief did not confer prevailing party status. In *Sierra Club v. City of Little Rock*, 351 F.3d 840 (8th Cir. 2003), the Sierra Club sued the City of Little Rock and the Little Rock Sanitary Sewer Committee under the Clean Water Act. After the Sierra Club settled with the Sewer Committee, it moved for summary judgment. The district court found that the City of Little Rock was in violation of its National Pollutant Discharge Elimination System (NPDES) permit, but refused to enter an injunction or order any other remedy against the city. The Sierra Club moved for an award of attorney fees, contending that it was a "prevailing or substantially prevailing party" entitled to fees under the Clean Water Act. The district court awarded the Sierra Club over $50,000 in attorney fees. The Court of Appeals reversed because the district court had not granted any enforceable relief. The Eighth Circuit explained:

> Although the district court granted summary judgment in Sierra Club's favor, *all Sierra Club received was a declaration that the City had violated its permit*. The court declined to grant any of the relief that Sierra Club sought, not even a requested order enjoining the City from future violations of its permit. . . . Sierra Club can point to no effect that the judicial declaration had on the City's behavior toward Sierra Club. Further, without any relief to enforce, Sierra Club did

> not receive an "enforceable judgment" and was not a prevailing party.

Id. at 845 (parentheticals omitted) (emphasis added).

The Court of Appeals in *Sierra Club* pointed out that without an injunction in place, "the court could not have held the City in contempt under its retained jurisdiction because the City would not have been in violation of any court order." *Id.* at 846. In the Eighth Circuit, unlike the Sixth Circuit, the grant of summary judgment without injunctive or other enforceable relief does not confer prevailing party status.

The Seventh Circuit in *Petersen v. Gibson,* 372 F.3d 872 (7th Cir. 2004), also ruled that a judgment that did not provide monetary, declaratory, or injunctive relief was insufficient to confer prevailing party status. Plaintiff in *Petersen* obtained a jury verdict against defendant police officer under 42 U.S.C. § 1983 and was awarded $1 in nominal damages. Plaintiff then moved for a new trial arguing that the trial court erred in giving the jury a nominal damages instruction resulting in the $1 award. The trial court granted the motion, vacated the damages award, and set the matter for a trial on the issue of damages only. The parties subsequently settled. After the settlement, plaintiff moved for attorney fees under 42 U.S.C. § 1988. The court in *Petersen* was faced with the issue of whether a judgment that confirmed a violation of plaintiff's civil rights, but was devoid of any damage award or other relief, was sufficient to make plaintiff a prevailing party. The Seventh Circuit ruled that the judgment did not:

> Therefore, in determining whether Petersen has prevailed, we must examine the practical impact of the judgment. The only judgment here is the one entered

> after the trial. That judgment originally awarded Petersen nominal damages, which would have been sufficient under *Farrar* to obtain prevailing party status, but not necessarily to obtain fees. That damage award, however, was vacated on Petersen's motion, and the settlement followed. *Therefore, the only judgment in this case is a determination that Petersen's rights were violated.* As the Supreme Court noted in *Buckhannon* however, attorney's fees are not available where plaintiff has "acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by '*judicial* relief.'" [emphasis in original]. It is the settlement, not the judgment of the court, that obtained the practical relief sought by Petersen, and therefore the judgment cannot provide a basis for prevailing party status.

Id. at 865-66.

The Seventh Circuit, therefore, has ruled that a judgment merely affirming a violation of civil rights but not awarding other relief does not confer prevailing party status.

The District of Columbia Circuit in *Thomas v. National Science Foundation*, 330 F.3d 486 (D.C. Cir. 2003), also strictly followed this Court's teachings on prevailing party status. In *Thomas*, plaintiffs filed suit against the National Science Foundation ("NSF"), a government agency, and Network Solutions, Inc. ("NSI"), a private contractor. Plaintiffs alleged that the NSF and NSI collected fees for internet registration services and the NSF retained 30% for deposit into a fund for future government use on internet projects. Plaintiffs alleged that the deposit of registration fees into the fund was an unconstitutional tax that was neither imposed nor ratified by Congress. The district court issued a

preliminary injunction barring the NSF and NSI from spending money in the fund. The district court also awarded plaintiffs partial summary judgment by declaring the portion of registration fees deposited into the fund unconstitutional. The district court did not award any other injunctive or monetary relief in connection with the award of partial summary judgment. After the grant of the preliminary injunction and partial summary judgment, Congress passed legislation that properly authorized deposits into the fund, rendering plaintiff's case moot. Plaintiffs then moved for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(e)(1)(A), contending that they were prevailing parties. Citing to *Buckhannon* and *Hewitt*, the D.C. Circuit ruled that plaintiffs were not prevailing parties.

Thomas reviewed *Buckhannon, Hewitt, Texas State Teachers,* and *Rhodes* and found three core principles in this Court's prevailing party jurisprudence. The first principle was that a claimant must show that there has been a "court-ordered 'change [in] the legal relationship between [the plaintiff] and the defendant.'" *Thomas,* 330 F.3d at 493, quoting *Buckhannon,* 532 U.S. at 604. Second, a party must be awarded a judgment providing "some relief by the court." *Id.* at 493, quoting *Buckhannon* at 603. Third, "a claimant is not a 'prevailing party' merely by virtue of having 'acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by *judicial* relief.'" *Id.*, quoting *Buckhannon* at 606. Under these principles, *Thomas* determined that the grant of a preliminary injunction did not afford plaintiffs prevailing party status. *Thomas* also rejected plaintiffs' argument that the grant of partial summary judgment made them prevailing parties:

> Appellees' claim fares no better with respect to the partial summary judgment. That order merely

> declared that the disputed Preservation Assessment was an unconstitutional tax. The partial summary judgment did not afford appellees any concrete relief beyond this mere legal declaration. As noted above, *Buckhannon* and *Hewitt* make it clear that a mere "judicial pronouncement that the defendant has violated the Constitution," unaccompanied by "*judicial* relief," is not sufficient to make a claimant a "prevailing party." This type of "judicial decree" is not enough to warrant a fee award, because it represents "not the end but the means" of litigation. A declaration must require "some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or specific performance or determination of some conduct." The partial summary judgment in this case did not achieve any such results.

Id. at 493-94 (citations omitted).

The D.C. Circuit, therefore, ruled that summary judgment confirming a Constitutional violation but awarding no other relief fails to confer prevailing party status.

The Sixth Circuit in this case held that summary judgment without an award of judicially enforceable relief is sufficient to make plaintiffs prevailing parties. This ruling is contrary to the Seventh, Eighth, and D.C. Circuits in *Sierra Club*, *Peterson*, and *Thomas*.

3. If Repeated, the Sixth Circuit's Reliance upon Statements Made on the Record and Not Incorporated in a Judgment Will Erode the Certainty of Judgments and this Court's Prevailing Party Rulings.

It is axiomatic that "The court speaks through its judgment, and not through any other medium." *Hill v United States ex rel. Wampler*, 298 U.S. 460, 465; 56 S. Ct. 760; 80 L. Ed. 1283 (1936); *see also Bell v. Thompson*, 545 U.S. 794, 805; 125 S. Ct. 2825; 162 L. Ed. 2d 693 (2005) ("'Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders.'" quoting *Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 44 (4th Cir. 1984)).

According to *Murdaugh*:

> Courts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or after trial, or during argument. When the terms of a judgment conflict with either a written or oral opinion or observation, that judgment must govern.

Id. at 44.

This reasoning is sound, but unfortunately contradicted by the Sixth Circuit's opinion. This Court should affirm the time-honored rule in *Murdaugh* that a court speaks only through its written orders and judgments. A judgment that does not grant enforceable relief by its express terms cannot be the basis for prevailing party status.

Murdaugh's rule provides certainty in the judicial process. The Sixth Circuit's position that it is acceptable to look behind a written judgment does not.

The district court's judgment in this case is the only judicial pronouncement upon which the Sixth Circuit should have based a prevailing party determination, but the judgment does not order or enjoin any conduct or award any damages. The terms of the judgment, therefore, do not support a ruling that plaintiffs are prevailing parties because those terms do not direct "some action (or cessation of action) by the defendant" such as "the payment of damages, or some specific performance, or the termination of some conduct." *Hewitt*, 482 U.S. at 761. The Sixth Circuit instead reviewed and relied upon selective comments the district court made at the summary judgment hearing to conclude that plaintiff obtained enforceable relief. The Sixth Circuit's reliance on the hearing transcript, not the judgment, produces the peculiar result that plaintiffs, despite not being awarded injunctive or declaratory relief, nevertheless obtained "complete" relief:

> When the plaintiffs filed their First Amended Complaint, the defendants denied them their requested use of the property. Now the plaintiffs are *expressly allowed* their proposed use of the property without any application of the defendants' zoning ordinances. *The fact that the court did not grant an injunction or declaratory judgment when it granted the plaintiffs' motion for summary judgment does not make the ultimate relief less complete.*

471 F.3d at 671 (emphasis added) [Pet. App. pg. 16a].

The Sixth Circuit characterized the judgment as having the effect of a declaratory ruling or injunction "expressly

allow[ing] [plaintiffs'] proposed use of the property." *Id.* The district court, however, noted that "no declaratory or injunctive relief was awarded" by its judgment. Opinion, Appx. at 20a.

Certainty and finality are essential to our judicial system. Judgments are always the product of deliberation. At the conclusion of a hearing or trial, the litigants and the court itself often do not know what a judgment will state. Indeed, a judgment is commonly entered well after argument. Ultimately, however, the court must make its decision, and when it does, its judgment should be the clear and final word. *See, e.g., Ramdass v. Angelone*, 530 U.S. 156, 174; 120 S. Ct. 2113; 147 L. Ed. 2d 125 (2000) ("it is judgment which signals that the case has become final and is about to end or reach another stage of proceedings."). Any other result would mean chaos, with appellate courts and litigants unsure of what, if anything, a court has decided. The Sixth Circuit's opinion provides a basis to undermine the certainty and finality of judgments. If comments a court makes while considering the parties' arguments can later be grafted on to a judgment, both certainty and finality are at risk. This Court should grant certiorari to prevent a danger to the judicial process.

CONCLUSION

This Court should grant the Township's petition for certiorari to address important issues of federal law on which the circuits are divided and which this Court should settle.

Respectfully submitted,

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Counsel for Petitioners Township of Ann Arbor; Ann Arbor Township Zoning Official; Ann Arbor Township Zoning Board of Appeals

September 10, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-2482/2506

[Filed June 12, 2007]

TIM DILAURA, ET AL., Plaintiffs-Appellants,	)
v.	)
TOWNSHIP OF ANN ARBOR, ET AL., Defendants-Appellees.	)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

BEFORE: MERRITT and MOORE, Circuit Judges; and COLLIER,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

* Hon. Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. However, the panel amends its opinion to add a new footnote two to the text on page four of the slip opinion:

<2> In their petition for rehearing/rehearing en banc, the defendants cite, for the first time, a case which, they argue, requires that a court provide a plaintiff with a monetary judgment or an injunction before the plaintiff can achieve prevailing party status. Pet. for Reh'g/Reh'g En Banc at 10 (citing *Gregory v Shelby County,* 220 F.3d 433, 447 (6th Cir. 2000)). We note that this argument conflicts with the defendants' earlier argument to this court that, to be a prevailing party, the plaintiff must obtain "relief in the form of a money judgment, an enforceable declaratory judgment or an injunction." Br. of Defs.-Appellees/Cross-Appellants at 24. Now the defendants are arguing that only a monetary judgment or injunction will suffice.

Both arguments, however, are wrong. Defendants' new argument fails because *Gregory,* and the case upon which it relied, *Wooldridge v. Marlene Indus. Corp.,* 898 F.2d 1169 (6th Cir. 1990), have both been abrogated by *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources,* 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). *Buckhannon* makes clear that all that is required to obtain prevailing party status is a judgment that is enforceable and on the merits. *Id.* at 604 ("[E]nforceable

judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989))). To the extent that *Gregory* and *Wooldridge* limit prevailing parties to those parties who obtain monetary judgments or injunctions, they are abrogated.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-2482/2506

[Filed December 27, 2006]

TIM DILAURA; DF LAND DEVELOPMENT L.L.C.; APOSTOLATE FOR THE EUCHARISTIC LIFE,
Plaintiffs-Appellants/Cross-Appellees,

v.

TOWNSHIP OF ANN ARBOR; ANN ARBOR TOWNSHIP ZONING OFFICIAL; ANN ARBOR TOWNSHIP ZONING BOARD OF APPEALS,
Defendants-Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 00-70570—Bernard A. Friedman, Chief District Judge

Before: MERRITT and MOORE, Circuit Judges; COLLIER, Chief District Judge.*

* The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiffs Tim DiLaura ("DiLaura"), DF Land Development, L.L.C., and Apostolate for the Eucharistic Life (collectively "the plaintiffs") appeal the district court's order granting the plaintiffs attorney fees and costs. The plaintiffs argue that the district court abused its discretion in ordering a sixty-percent reduction from the amount recommended by the magistrate judge's Report and Recommendation. The defendants Township of Ann Arbor, Ann Arbor Township Zoning Official, and Ann Arbor Township Zoning Board of Appeals (collectively "the defendants") cross-appeal, arguing that the district court erred in ruling that the plaintiffs were entitled to any costs or fees because they were not prevailing parties.

Because the district court was within its discretion in finding that the plaintiffs were prevailing parties, but abused its discretion in reducing the fees and costs by sixty percent, we **AFFIRM** in part and **REVERSE** and **REMAND** in part the district court's judgment granting attorney fees and costs to the plaintiffs in the amount of $72,214.24.

I. BACKGROUND

As this is the third time that these parties have come before our court, there is a long history behind this case. DiLaura, as a member and Executive Director of the Apostolate for the Eucharistic Life, received a charitable donation of real estate in the Township of Ann Arbor for hosting guests for religious prayer and contemplation. In conjunction with this proposed use, DiLaura planned on providing complementary food and overnight accommodations for approximately eight guests throughout each week.

DiLaura sent a letter to the zoning official asking whether the plaintiffs' proposed property use under the donation was prohibited by the defendants' zoning ordinance. The zoning official responded that DiLaura was prohibited under the zoning laws from using the property in the way in which he proposed. DiLaura filed an application for a variance, but the zoning board of appeals denied the variance application.

The First Amended Complaint was brought under 42 U.S.C. § 1983, and alleged violations of, inter alia, the plaintiffs' right to free exercise of religion under the First Amendment of the United States Constitution and the Religious Freedom Restoration Act. U.S. CONST. amend I; 42 U.S.C. § 2000bb *et seq.* ("RFRA"). The district court granted the defendants' motion to dismiss for lack of subject matter jurisdiction, holding that the plaintiffs lacked standing and that the plaintiffs' claims were not ripe.

In *DiLaura v. Ann Arbor Charter Twp.*, 30 F. App'x 501, 505-07 (6th Cir. 2002) (unpublished opinion) ("*DiLaura I*"), we concluded that the plaintiffs did have standing and that their claims were ripe for review. Although we disagreed with the district court's reasoning, we agreed that there was no First Amendment violation. *Id.* at 508. However, we concluded that the plaintiffs' RFRA claim was still valid. Although parts of RFRA had recently been declared unconstitutional by the Supreme Court while *DiLaura I* was on appeal, Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), which amended RFRA. *DiLaura I*, 30 F. App'x at 507. Thus, we remanded to the district court to determine whether the defendants were violating the plaintiffs' rights under RFRA as amended by RLUIPA. *Id.* at 510.

After *DiLaura I*, on November 14, 2002, the plaintiffs filed a Second Amended Complaint, formally claiming a violation under RLUIPA. On December 16, 2002, the township board of trustees, on the recommendation of the planning commission, granted the plaintiffs a conditional permit to operate a bed and breakfast. Although the defendants asserted that they would not enforce it, a bed and breakfast permit requires that the permitee charge guests a fee and prohibits serving alcohol or meals other than breakfast and light snacks. These restrictions, if enforced, would interfere with the plaintiffs' plan to provide services for free and to serve lunch, dinner, and communion wine.

On remand from *DiLaura I*, the district court granted summary judgment in favor of the plaintiffs, concluding that the defendants' bed and breakfast proposal violated RLUIPA. While acknowledging that the defendants were not going to enforce the bed and breakfast provisions at the present time, the district court stated that it had "to look at what [the bed and breakfast ordinance] says and take it [as] exactly what [the defendants] could do." Joint Appendix ("J.A.") at 838 (Mot. Hr'g on Cross-Mot. for Summ. J. ("Hr'g") at 27). The district court did not formally grant an injunction, but, rather, stated on the record that the defendants could never enforce the bed and breakfast provisions against the plaintiffs. The defendants appealed, and we affirmed. *DiLaura v. Twp. of Ann Arbor*, 112 F. App'x 445, 446 (6th Cir. 2004) (unpublished opinion) (*DiLaura II*).

This brings us to the issue before us today. After *DiLaura II*, the plaintiffs requested attorney fees and costs associated with litigating this case. The magistrate judge issued a Report and Recommendation concluding that the plaintiffs were entitled to attorney fees and costs in the amount of $178,535.61. The district court found that the plaintiffs were

prevailing parties, but reduced the award by sixty percent to $72,214.24. The parties cross-appealed to this court; we have jurisdiction over their appeals under 28 U.S.C. § 1291.

II. PREVAILING PARTIES

We review a district court's determination of prevailing party status for clear error. *Knology, Inc. v. Insight Commc'ns. Co., L.P.*, 460 F.3d 722, 726 (6th Cir. 2006). The defendants argue that the plaintiffs are not entitled to any attorney fees or costs, because they do not qualify as "prevailing parties" under 42 U.S.C. § 1988(b).[1] Section 1988(b) provides, in pertinent part, that in an action to enforce provisions under RFRA or RLUIPA "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." Prevailing party status is a "statutory threshold" which must be crossed before there is any consideration of a fee award. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989). This threshold is crossed when "the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' . . . ." *Id.* at 791-92 (alteration in original) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). *See also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 421 F.3d 417, 420 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 2916, 165 L. Ed. 2d 917 (2006).

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[1] According to Rule 54(d) of the Federal Rules of Civil Procedure, costs are to be awarded as "of course" to the prevailing party. Although costs are part of the ultimate award that plaintiffs seek, the debate between the parties focuses on attorney fees under 42 U.S.C. § 1988.

"'[T]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.'" *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (quoting *Garland*, 489 U.S. at 792-93). A material alteration requires that "[t]he plaintiff [] obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Id.* (citations omitted). The relief must directly benefit the plaintiff "at the time of the judgment or settlement." *Id.* In contrast, "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that" the plaintiff is not a prevailing party under the statute. *Garland*, 489 U.S. at 792. Further, the change in the relationship between the parties must be court ordered—if a party's change in position is purely voluntary, then there is no prevailing party. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

The defendants make two overlapping arguments in defense of their position that the plaintiffs are not prevailing parties. First, the defendants argue that their change in position was purely voluntary, that the district court did not order the defendants to do anything, and, therefore, under *Buckhannon*, the plaintiffs are not prevailing parties. We cannot agree with the defendants' characterization of their actions as voluntary. To the contrary, if the defendants' actions in this case were voluntary, they would not have appealed the district court's decision in *DiLaura II*. The plaintiffs did not obtain full relief in this case until the district court announced, and this court affirmed, that the defendants could not enforce the bed and breakfast permit limitations against the plaintiffs. Thus, the defendants' actions were not completely voluntary.

Second, the defendants argue that the grant of summary judgment in the plaintiffs' favor was only a technical or symbolic victory, and, thus, under *Farrar v. Hobby*, the plaintiffs are not prevailing parties. They argue that the rule is that "a plaintiff who does not obtain relief in the form of a money judgment, an enforceable declaratory judgment or an injunction is not a prevailing party under Section 1988." Br. of Defs.-Appellees/Cross-Appellants at 24. According to the defendants, because the district court's grant of summary judgment in favor of the plaintiffs did not include one of these forms of relief, the plaintiffs are not prevailing parties.

The defendants' argument rests on an erroneous view of the law. They do not cite any cases stating that a party must obtain a money judgment, an enforceable declaratory judgment, or an injunction before it is entitled to prevailing party status.[2] As explained above, if the party points to

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[2] In their petition for rehearing/rehearing en banc, the defendants cite, for the first time, a case which, they argue, requires that a court provide a plaintiff with a monetary judgment or an injunction before the plaintiff can achieve prevailing party status. Pet. for Reh'g/Reh'g En Banc at 10 (citing *Gregory v. Shelby County*, 220 F.3d 433, 447 (6th Cir. 2000)). We note that this argument conflicts with the defendants' earlier argument to this court that, to be a prevailing party, the plaintiff must obtain "relief in the form of a money judgment, an enforceable declaratory judgment or an injunction." Br. of Defs.-Appellees/Cross-Appellants at 24. Now the defendants are arguing that only a monetary judgment or injunction will suffice.

Both arguments, however, are wrong. Defendants' new argument fails because Gregory, and the case upon which it relied, *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169 (6th Cir. 1990), have both been abrogated by *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S.

success on a significant issue leading to a material legal alteration between the parties, then that party has crossed the "statutory threshold" into prevailing party status. Although a money judgment, an enforceable declaratory judgment, or an injunction will indicate such an alteration between the parties, these are not the only ways in which such a changed relationship may manifest itself. The case at bar provides an example.

Here, the district court granted the plaintiffs' motion for summary judgment, and stated on the record that the defendants could not enforce their ordinance against the plaintiffs' proposed use of the property. The district court explained that it was not granting an injunction because "the relief [the plaintiffs were] asking for in effect is [the defendants] not enforcing their ordinance. I'm going to grant that. That's your motion for summary judgment." J.A. at 836 (Hr'g at 25). While the district court declined to label the relief "injunctive," the effect of its order granting summary judgment materially affected the legal relationship between the parties in that after the district court's judgment was rendered, the threat of enforcement no longer existed. The plaintiffs' victory was not merely technical or symbolic, and

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598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). Buckhannon makes clear that all that is required to obtain prevailing party status is a judgment that is enforceable and on the merits. *Id.* at 604 ("[E]nforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792-93, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989))). To the extent that *Gregory* and *Wooldridge* limit prevailing parties to those parties who obtain monetary judgments or injunctions, they are abrogated.

the district court's determination that the plaintiffs were prevailing parties was not clearly erroneous.

III. FEE REDUCTION

A. Standard of Review

We review for abuse of discretion a district court's determination of the attorney fees due under § 1988, affording "substantial deference" to the district court's decision. *Deja Vu*, 421 F.3d at 423. Abuse of discretion "exists only when a district court 'relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard.'" *Id.* (quoting *Wikol ex rel. Wikol v. Birmingham Pub. Schs. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004)).

B. The Decision to Reduce the Award Was An Abuse of Discretion

In the case at bar, the district court abused its discretion on three levels, all of which culminated in its decision to reduce the fees and costs awarded. First, it incorrectly concluded that the plaintiffs were not entitled to fees for work done prior to the Second Amended Complaint, because the plaintiffs ultimately prevailed only on their RLUIPA claim which was not raised until the Second Amended Complaint. Second, the district court applied the wrong legal standard, because, although it implicitly found that the case at bar was one involving a common core of facts, it improperly treated the various claims as distinct, reducing fees based on the number of claims won versus the number of claims lost. Third, the district court erred in finding that the plaintiffs did not get complete relief.

1. Relationship Between RLUIPA Claim and the Original Complaint

One reason motivating the district court's decision to reduce attorney fees and costs was its conclusion that the plaintiffs did not raise their RLUIPA claim until the Second Amended Complaint. According to the district court, "[n]one of the claims initially pled succeeded and none of the relief initially sought was obtained." J.A. at 302 (Order at 3).

But in *DiLaura I*, we explained that in their First Amended Complaint the plaintiffs pleaded a claim under RFRA which was amended by RLUIPA, enacted while the case was on appeal. *DiLaura I*, 30 F. App'x at 507. Thus, on remand, the panel instructed the district court to adjudicate the original RFRA claim according to the RLUIPA provisions. *Id.* at 510. It follows that the district court was incorrect in its finding that none of the original claims succeeded, because, according to *DiLaura I*, the panel required the RFRA claim in the First Amended Complaint to be adjudicated as a RLUIPA claim. Even though the plaintiffs did not formally include a RLUIPA claim until their Second Amended Complaint, it was an abuse of discretion for the district court to ignore the decision of a panel of this court in *DiLaura I*, and to treat the RLUIPA claim as unconnected to the work related to the First Amended Complaint.

2. The District Court Applied the Wrong Legal Standard to a Case Involving a Common Core of Facts and Related Legal Claims

The district court also abused its discretion in failing to state the correct legal standard applicable when a series of related legal claims are based on a common core of facts. We recently stated that:

> "[A] court should not reduce attorney fees based on a simple ratio of successful claims to claims raised. When claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced."

Deja Vu, 421 F.3d at 423 (quoting *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) (citation omitted)). "'Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing the fee. The result is what matters.'" *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (footnote omitted)).

In the case at bar, the district court's statement of the applicable law is selective and, thereby, misleading. To the extent that the standard is stated correctly, the opinion improperly applies that standard to the facts. The district court opinion states:

> In determining a reasonable attorney fee "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended in the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). Further a reduction from the lodestar is appropriate when the prevailing party "achieve[s] only partial or limited success." *Id.* at 436.
>
> In the present case, plaintiffs' success was "partial or limited indeed." *None of the claims initially pled*

> *succeeded* and none of the relief initially sought was obtained. Three years into the litigation plaintiffs asserted *the RLUIPA claim, which did succeed, but still the remaining claims failed* and no declaratory or injunctive relief was awarded.

J.A. at 302-03 (Order at 3-4) (alteration in original) (emphasis supplied). The district court's quotation from *Hensley* fails to recognize that the Supreme Court mandated the following: "Such a lawsuit [one involving a common core of facts] cannot be viewed as a series of discrete claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435.

By focusing on the fact that most of the plaintiffs' claims failed, the district court does what *Hensley* specifically forbids: it analyzes a series of related legal claims based on a common core of facts, and determines the amount of fees, not based on the plaintiffs' overall success, but based on the success or failure of the individual claims.[3] Because the plaintiffs ultimately prevailed on only one of their related legal claims, the district court reduced the attorney fees and costs by sixty percent. It is of no import that the relief came only from the RLUIPA clam, because under *Hensley* "[t]he

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[3] The district court opinion does not even mention the phrase "common core of facts," but given that the portion of *Hensley* from which it quotes is specific to cases involving a common core of facts, we infer that the district court believed this to be such a case. This is certainly the more plausible position—all of the claims were based on the defendants' refusal to grant the plaintiffs permission to operate a religious retreat, and all of the claims were designed to enable use of the property at issue as proposed.

result is what matters." *Id.* Thus, the district court's reduction in fees was an abuse of discretion.

3. The Relief Obtained Was Complete

The district court also erred in deciding that the "plaintiffs' success was 'partial or limited. . . .'" J.A. at 302 (Order at 3). When the plaintiffs filed their First Amended Complaint, the defendants denied them their requested use of the property. Now the plaintiffs are expressly allowed their proposed use of the property without any application of the defendants' zoning ordinances. The fact that the court did not grant an injunction or declaratory judgment when it granted the plaintiffs' motion for summary judgment does not make the ultimate relief less complete.

IV. CONCLUSION

The parties dispute whether there was a stipulation as to the correct amount of fees and costs due to the plaintiffs in this case if they were to prevail. We need not reach this issue at this time; we conclude that, in this case, it is more appropriate to remand to the district court for a decision on fees that is consistent with our opinion.

For the foregoing reasons we **AFFIRM** the district court's judgment that the plaintiffs are prevailing parties, we **REVERSE** the district court's judgment insofar as it reduced the fees and costs by sixty percent, and we **REMAND** to the district court for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 00-CV-70570-DT

[Filed September 28, 2005]

TIM DiLAURA, DF LAND DEVELOPMENT LLC and APOSTOLATE FOR THE EUCHARISTIC LIFE, Plaintiffs,	)
v.	)
ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS, Defendants.	)

OPINION AND ORDER ACCEPTING IN PART AND REJECTING IN PART MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION REGARDING PLAINTIFF'S MOTION FOR COSTS AND ATTORNEY FEES

This matter is presently before the court on plaintiffs' motion for costs and attorney fees. The motion was referred

to Magistrate Judge Wallace Capel, Jr., who has issued a report recommending that the motion be granted. Defendants have filed objections to the report and recommendation, plaintiffs have responded to the objections, and defendants have filed a reply.

The court agrees with the magistrate judge's conclusion that plaintiffs are prevailing parties within the meaning of 42 U.S.C. § 1988(b) and that they are therefore entitled to some measure of attorney fees. However, the court disagrees with the magistrate judge's conclusions that plaintiffs in this lawsuit "received exactly what they sought" and that they are entitled to their requested fee of approximately $175,000.[1]

While plaintiffs did succeed in obtaining a ruling that defendants violated their rights under the Religious Land Use and Incarcerated Persons Act (RLUIPA), 42 U.S.C. § 2000cc, they did not prevail on *any* of their other claims and they did not obtain *any* other relief. In their 30-paged first amended complaint, plaintiffs asserted claims for violation of their rights under the First, Fourth, Fifth and Fourteenth Amendments, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, the Michigan Constitution, and the Fair Housing Act, 42 U.S.C. § 3604. Plaintiffs also claimed that the township ordinance was void for vagueness, that it

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[1] Although plaintiffs initially sought $230,608 in fees and $5,299 in costs, they reduced the total to $174,650.61 after conferring with defendants at the magistrate judge's request. *See* Report and Recommendation, p. 13 n.10; defendants' Objections to the Report and Recommendation, p. 4; plaintiffs' Response to the Objections, p.1. In addition, plaintiffs seek $5,885 for fees incurred in preparing supplemental briefs relating to this fee petition. The court therefore understands plaintiffs to be seeking a total of $180,535.61.

violated their due process rights, that the ordinance constituted "exclusionary zoning" under M.C.L. § 125.592 and an unlawful prior restraint on First Amendment rights, and that it rendered their property valueless and was "confiscatory." Plaintiff also asserted a claim for "appeal" of the ZBA decision. Plaintiffs did not prevail on any of these claims. For relief, plaintiffs sought an order allowing them to use their property for the purpose they proposed; an injunction enjoining enforcement of the ordinance; a declaration that the ordinance was unconstitutional and invalid; a declaration that defendants' actions were unreasonable and arbitrary; a declaration that defendants' actions were unconstitutional and violative of plaintiffs' due process rights and plaintiffs' rights under the Michigan Constitution; and a declaration that the ordinance was void for vagueness and an improper prior restraint on plaintiffs' First Amendment rights. Plaintiffs did not receive any of this relief.

Plaintiffs did succeed in obtaining a ruling from the court of appeals, which reversed this court's grant of summary judgment for defendants and remanded the case for further proceedings. Interestingly, the court of appeals focused on whether plaintiffs had standing to assert a claim under RLUIPA, which was enacted while the appeal was pending. Nine months after the court of appeals issued its opinion, plaintiffs finally amended their complaint in order to assert, for the first time, a claim under RLUIPA. Plaintiffs also repeated their earlier claims and demands for relief.

This court eventually granted summary judgment for plaintiffs, but only under RLUIPA. The court of appeals affirmed, but likewise only under RLUIPA. As defendants correctly note, plaintiffs actually prevailed only on this single claim – a claim they formally pled, for the first time, in their second amended complaint, which was filed nearly three

years after the lawsuit was commenced.[2] Plaintiffs clearly did not prevail on any of their various other claims, and they did not obtain any of the various forms of requested injunctive or declaratory relief. In determining a reasonable attorney fee "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). Further, a reduction from the lodestar is appropriate when the prevailing party "achieves only partial or limited success." *Id.* at 436.

In the present case, plaintiffs' success was "partial or limited" indeed. None of the claims initially pled succeeded and none of the relief initially sought was obtained. Three years into the litigation plaintiffs asserted the RLUIPA claim, which did succeed, but still the remaining claims failed and no declaratory or injunctive relief was awarded. Under these unique circumstances, a 60% across-the-board reduction of the requested amount of costs and fees is warranted. Accordingly,

IT IS ORDERED that plaintiffs' motion for costs and attorney fees is granted in the amount of $72,214.24 ($180,535.61 x .40).

IT IS FURTHER ORDERED that Magistrate Judge Capel's Report and Recommendation is accepted in part and rejected in part as explained above.

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[2] Plaintiffs commenced suit in Washtenaw Circuit Court on January 10, 2000. They filed their second amended complaint on November 14, 2002.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

Dated: September 28, 2005
Detroit, Michigan

JUDGMENT

The court has granted plaintiffs' motion for costs and attorney fees. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants in the amount of $72,214.24.

DAVID J. WEAVER
CLERK OF COURT

By: /s/Carol L. Mullins
Deputy Clerk

September 28, 2005

Approved: /s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 00-CV-70570

[Dated April 9, 2003]

TIM DiLAURA, DF LAND DEVELOPMENT, LLC, and APOSTOLATE FOR THE EUCHARISTIC LIFE, Plaintiffs,	)
v.	)
ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP, ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS, Defendants.	)

CROSS-MOTIONS FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE
BERNARD A. FRIEDMAN
United States District Judge
238 U.S. Courthouse and Federal Building
231 Lafayette Boulevard West
Detroit, Michigan 48226

APPEARANCES:

For the Plaintiff: Robert Bunting, Esq.
Robert Charles Davis, Esq.

For the Defendant: William B. Forrest, III, Esq.

Court Reporter: Joan L. Morgan, CSR
Official Court Reporter

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

[p.2]

Detroit, Michigan
Wednesday, April 9th, 2003

THE CLERK: Calling case DiLaura versus Ann Arbor Charter Township, case number 00-70570.

THE COURT: Good afternoon.

Maya we have appearances please?

MR. FORREST: William Forrest, on behalf of the defendants, your Honor.

MR. BUNTING: Robert Bunting, on behalf of plaintiff.

MR. DAVIS: Your Honor, Robert Davis, on behalf of the plaintiff.

Good Afternoon.

THE COURT: Good afternoon, your Honor.

Do we have the plaintiff here? Good. It's always good to see litigants.

You know, I always think, if it were my case I would want to be there.

MR. DAVIS: This is Mr. and Mrs. DiLaura.

THE COURT: Okay. Go on.

MR. DAVIS: Thank you, your Honor.

Robert Davis, again, on behalf of the plaintiff.

Living in Romeo without power --

THE COURT: I understand.

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MR. DAVIS: My wife did hook up a generator, but it didn't get to the washing machine, and I think the dry cleaners was also without power.

THE COURT: That's fine. I know how tough it is.

It's so crazy. You know, you go and flip on a switch just because you're so used to it, and it doesn't go on.

MR. DAVIS: The TV works but the washing machine doesn't. I'll have to get to that tomorrow.

THE COURT: The TV is more important.

MR. DAVIS: Your Honor, we have submitted our papers and I think --

THE COURT: Yes, I've read them.

MR. DAVIS: -- we've done a good job of getting you -- and I only want to punctuate for you our argument. And I want to start with this: Our plaintiffs filed a notice. We submitted a zoning request under the Zoning Scheme. We were told we were not permitted use under their Zoning Scheme. It puts it to the ZBA. We went to the ZBA and we were flatly denied the use.

The Sixth Circuit, as we know, has confirmed the plaintiffs' standing to challenge the ordinance issue under the RLUIPA law. And the Sixth Circuit had ruled that jurisdiction is triggered, and that our activity proposed for the property as a religious exercise is substantially

[p.4]

burdens by an ordinance scheme that said no.

Your Honor, under the law which is in front of you, the defendants cannot impose a burden on a religious exercise unless they first show a compelling governmental interest.

After our last conference with you we did some discovery which is now before the Court. And it shows --

THE COURT: It doesn't say burden, substantial burden.

MR. DAVIS: Yes, sir.

THE COURT: Substantial is the key to the --

MR. DAVIS: Right.

We did discovery, Judge, and we have that before you.

There's no police concern here. It's been admitted. There is no public health concern, no traffic concern, no sewage concern, no fire safety concern. All admitted in the request, there's no concern. We had two full hearing nights before the ZBA and no concerns were expressed during those hearings.

In their papers to you the defendants have not put forth any compelling governmental interest at all. I don't think they even argued that. Instead what they did, and what they've put before you is they held a meeting which we timely objected to, and labeled it a bed and

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breakfast.

The only real significance of that hearing, your Honor, is that that hearing again concluded that there was no compelling governmental interest. If you look at the resolutions of that particular meeting it said that our use -- it meets the standards of the ordinance; it's compatible with the area. There's no parking problem, and there's no impact.

But they still have yet to show a compelling governmental interest for their actions, that action or the prior action.

When you look at the *Murphy* case which I know you've read, it's right on point. They just can't do this.

So they make a decision unilaterally that they're going to label it as a bed and breakfast. It only compounds the burden, Judge. It compounds the burden, and let me tell you why.

THE COURT: No, I understand.

Why doesn't the township get an ordinance, have a retreat ordinance?

MR. FORREST: Because I don't think the township should have any ordinance that has a religious focus.

It's clear, your Honor -

THE COURT: Well, people go on retreats for reasons other then religion. We go on retreats -- our

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management staff go on retreats for purposes of discussion, but we don't go to a bed and breakfast.

MR. FORREST: Well, you go to some place that might have fifty rooms.

THE COURT: Well, we don't, but we could.

MR. FORREST: You don't go to someone's house.

But what difference does it make, your Honor, if the conditional permit says -- condition of use permit says bed and breakfast?

The point is -

THE COURT: It makes a difference to them.

MR. FORREST: Well, the point is -

THE COURT: Because they're not a bed and breakfast.

MR. FORREST: Well, the point is, your Honor, everything that Mr. DiLaura proposed in 1999, he can do today with that permit.

And the Sixth Circuit analogized the proposed use, to do a bed and breakfast.

THE COURT: The truth of the matter is, and I guess I'm just speaking as truthfully as I can, had they not applied for this -- to the township for anything, they could have done what they wanted to do anyhow -

MR. FORREST: Well, they probably could have -

THE COURT: -- and nobody would have said a thing

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or would have said a word or would have done anything because they're not doing anything that -

MR. FORREST: They probably could have, your Honor.

THE COURT: You know -

MR. FORREST: They -

THE COURT: I mean, from day one, this lawsuit has bothered me for no other reason other -- not bothered me, you

know, because had they wanted a retreat at their house I don't think anybody in the whole world would have -- and wanted to do it as often or -- you know, probably would have been very much welcomed, you know. We all need a little more spirituality in our lives.

MR. FORREST: Well, and the only thing that the township had any interest was the housing of overnight guests.

THE COURT: They only had an interest because they applied for a permit. If they didn't ask for a permit, they could have had all the housing they wanted over there.

MR. FORREST: Well, they asked is this allowed as a matter of right in this agricultural zone, and it's not. And then they said, well, we want a variance. And the ZBA under Michigan just didn't have the authority to grant this variance.

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MR. DAVIS: Your Honor, that's absolutely not true. Under the Zoning Scheme, we sent a letter in for fear of prosecution and said is this okay. A letter comes back, says, no, that's not permitted.

When you get a letter under their Zoning Scheme, you don't go -- the ZBA and their Zoning Scheme is not for variance purposes, it's an appeal for those decisions.

We followed the Zoning Scheme. We had a question as to whether or not we had a right to do this. We asked. They said no. We went through their appellate process and here we are.

Now, the law is clear. Absent the showing of a compelling governmental interest summary judgment is appropriate in our favor, and we've got to get on with this.

THE COURT: If I granted you summary judgment, what good would that do? What happens? That means that you're not a bed and breakfast.

MR. DAVIS: That's right, your Honor, because a bed and breakfast –

THE COURT. Okay, you're not a bed and breakfast, but you still don't have a variance.

MR. DAVIS: We just have the use, your Honor. The use is allowed without the burden of the ordinance.

MR. FORREST: Your Honor, they have the use

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today.

THE COURT: Yes.

MR. FORREST: If I may, your Honor, and I direct the Court's attention to another case on the point you mentioned. It's the *Vineyards Christian Fellowship of Evanston versus City of Evanston*. We didn't cite it in our brief –

THE COURT: I was just going to say –

MR. FORREST: It's 31, March, 2003. So it was decided last week.

THE COURT: Okay.

MR. FORREST: And it's 2003, U. S. District Lexus 5079. And it discusses many things but on the question of RLUIPA it discusses substantial burden, and goes back and incorporates what has always been the test and that is not mere inconvenience but something that forces someone to abandon a fundamental religious tenant or deprives someone of a governmental privilege -

THE COURT: I don't think there's any substantial burden on this plaintiff. I really don't. But on the same token I don't think it's a bed and breakfast under any kind of conceivable, imaginable kind of thing when they're there for a retreat, you know. The alcohol issue doesn't bother me because, you know, as I think -- your argument would be, you know, every religious organization would need a liquor

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license no matter where -

MR. FORREST: But it really -

THE COURT: I tend to agree with the township that there's no substantial burden at all. But on the same token, it's not a bed and breakfast. No way in the world I could possibly say this is a bed and breakfast.

MR. FORREST: Your Honor, DiLaura is afraid today to put up a sign in front of that house that says Bread of Live, Retreat House, whatever, and they can call it whatever they want.

The mere fact that the township because of the way the zoning ordinance is structured, and it was structured long before this issue came up, requires a permit that says bed and breakfast condition of use permit.

What is the label? The label doesn't stop them from doing anything they propose -

MR. DAVIS: Your Honor -

MR. FORREST: The only thing I think it requires -

THE COURT: If the ordinance had bed and breakfast/retreat, I would say -- you know, I understand what you're saying, they're not a bed and breakfast, we're a retreat, we're a -

MR. FORREST: Well, your Honor -

THE COURT: I don't think they've met their

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burden, of any substantial burden on any religious exercise or anything -

MR. FORREST: Your Honor -

THE COURT: Why don't you amend your ordinances to put slash retreat and you're home free.

MR. FORREST: I will bring your Honor's concern to the township's board and suggest that they add that classification to the Zoning Order.

THE COURT: Go on.

MR. DAVIS: I do need to address that issue. When you look at -- now calling it a commercial use however he wants to label it. We had a conferred standing upon all the plaintiffs in this matter. You the donation paperwork before you as a matter of record, all had been confirmed up to the Sixth Circuit.

If you start calling this something other than just a religious use, you're going to trigger the taxing implication of that donation.

First of all, you go back in time. A bed and breakfast requires payment. It requires breakfast only. It requires certain refrigeration restrictions. It requires certain other things. It requires certain inspections with the state. It requires certain permits.

We don't want that extra burden -

THE COURT: Churches requires, churches require -

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and there's no substantial burden on a church or a synagogue or a mosque or anything of that nature. But fire regulations if they have kitchen facilities, they have to meet the code for refrigeration and so forth because whether you're praying or not, you have to do a lot of praying so that there's no fire, you're not praying that there's no fire -

MR. DAVIS: Your Honor, if you look -

THE COURT: People who are there for spirituality, they'll have a right to be protected –

MR. DAVIS: It's his burden to show the compelling governmental interest. You're actually making his argument.

If you look at the *Murphy* case, the *Murphy* case got all done with the analysis and said, oh, we have this lingering pretty good proof of a traffic problem, pretty good proof of a fire problem, but the *Murphy* court said but the government failed to show that this was a compelling governmental interest, and that it was the least restricted means to implore it.

So if you look at the *Murphy* case this issue already came up. You are making an argument for his compelling governmental interest, and I'm telling you that if you start calling this or we start labeling this to what it's not, if we lie just so we can get around it, and we

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call it something commercial, I'm going to lose the tax donation issues. I'm going to be triggered into another role of government. I'm going to have to get permits and inspections and all kinds of other things, other restrictions that I don't have right now. He's actually putting me in a worse category with more burden.

THE COURT: What are your burdens?

MR. DAVIS: The burdens of being a bed and breakfast?

THE COURT: Yes.

MR. DAVIS: The burden of being a bed and breakfast, Ordinance Provision 130.202, I have to charge people.

THE COURT: No, you don't have to. What's the language?

MR. DAVIS: It requires payment.

THE COURT: Hold on.

MR. DAVIS: It's Exhibit 7 to my brief, your Honor, the Ordinance Scheme.

THE COURT: I have it right here, too. I'm just looking at it.

MR. DAVIS: He says we read it wrong even though it says "shall require payment."

The township's position was -

THE COURT: Here it is, right here.

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MR. DAVIS: I can approach if you wish, your Honor.

It's Exhibit 7, Section 130.202, your Honor. It says "Definition, Schedule of Bed and Breakfast."

It's the second page of Exhibit 7, your Honor.

THE COURT: And where are you now?

MR. DAVIS: The second -- there's a definition for bed and breakfast in the Ordinance Scheme. It's the third definition down. The last -- "in return for payment."

THE COURT: I see.

MR. DAVIS: Okay, the next one, your Honor, is that -- you've already addressed, there's a prohibition against any alcoholic beverages.

The ordinance also only allows breakfast. It prohibits use of the refrigerator by the guests. It limits the number of the guests. We have to comply with state regulations.

Section 130.1124 requires that we now supply written evidence that we've complied with certain applicable codes and regulations and that we get a new certificate of occupancy.

Judge, and most importantly the tax implication, we're now a commercial business. We can't lie and then make it a commercial business. Two reasons: We don't want

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to go through those tax burdens. And number two -

THE COURT: If they passed an ordinance that said you have to meet the state fire code if you have people there. That you have to fire detectors. That you have to have adequate parking. That if you do serve meals that you'll comply with the standard, whatever the standard would be. If you're meals too, you know, people as a result of coming there for a specific religious purpose. Would that be a substantial burden, if it was designed for, specifically for a retreat.

MR. DAVIS: If he had that ordinance in place.

THE COURT: If there were such an ordinance.

MR. DAVIS: I think it would be arguably a substantial burden. But here, he doesn't have it.

He's trying to -

THE COURT: Let me give you some examples. Forget the bed and breakfast ordinance for a while. But if they had ordinances in certain areas you can have retreats for religious purposes. And the reason I say religious because I think they probably should be for anything, but you're saying for anything, then they're taxable.

I mean, what happens if somebody wants to have a retreat at -- you know, had this kind of property and I picture the property fairly rural -

MR. DAVIS: Right. A big house -

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THE COURT: Yes, and wanted to have it for, you know, for a company to come there and have a retreat for their employees or for a some -

MR. DAVIS: If you're just allowed to do it, it's fine. But if you stick a commercial label on it you're triggering the burden. And he, the township, has made a unilateral decision at their meeting, subject to our objection, we're just going to call you that.

Now -

THE COURT: My question is: If they had an order, number one, do you think they could pass such an ordinance?

Mr. Bunting, you can speak a little bit.

MR. BUNTING: If it limits us up to six people. The *Murphy* case says that's not -- that's a burden in and of -

THE COURT: Usually I don't let two people speak, but you were so anxious to -

MR. BUNTING: The donation, that sort of thing, it kills the donation.

MR. FORREST: Your Honor, the proposal that we received in 1999, that was discussed by the Sixth Circuit was two or three people on week nights up to five on weekends.

We said, let's be safe, we'll give you six. Now,

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they're complaining we gave them more than what they asked for.

The tax issue was not raised in any of the papers. But I can assure you, your Honor, that you're only taxed on income. And if Mr. DiLaura wants to charge a penny, or charge nothing, it's of no concern to the township. And there are no tax implications. And this is raised -

THE COURT: Except the ordinance says in return for payment.

MR. FORREST: In return for payment, and it doesn't say the amount.

THE COURT: But even if it's a penny, they're saying it's a penny too much.

MR. FORREST: Is that a burden, your Honor? And as a Catholic for fifty-five years, I know that religion is not adverse to the collection of money.

MR. DAVIS: Your Honor –

MR. FORREST: But that's not a burden.

THE COURT: There's no organization that is adverse to collecting money.

MR. FORREST: And, your honor, that's not a requirement. We do not say you must charge a minimum. That's a generic description of something that your Honor might consider a retreat house.

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But how can one get a substantial burden on a fundamental religious belief by these silly little things that we don't want to have fire protection. We don't -- we want to serve the same meals that were proposed in 1999, we said fine. Now they complain their limitation on meals.

Your Honor, no matter what we provided to these plaintiffs, they would be dissatisfied.

MR. DAVIS: Your Honor, there's a charitable –

MR. FORREST: Because every time we address their issues -- as your Honor suggested, we gave exactly what was suggested in your chambers without complaint –

MR. DAVIS: No.

MR. FORREST: -- and now they complain.

THE COURT: Their only complaint now is that you're calling it a bed and breakfast.

MR. FORREST: Your Honor, call it whatever they want. We're not going to put a sign –

THE COURT: They can't call it whatever they want because you don't have an ordinance to fit in with whatever you want.

MR. FORREST: We don't say put a bed and breakfast sign up. Put whatever sign you want up.

THE COURT: I understand. The township in terms of enforcement and so forth, it's saying, hey, you know, we're not going to literally enforce this, we're not going

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to be in there doing an audit to see whether or not you serve breakfast and lunch, or, you know, something like that. We're not going to be there to see if you've collected a penny. We're not doing any of those things. That's not their problem. Their problem is that you have the ability to do so if you want to and they're here for the principle as well –

MR. FORREST: Your Honor, we don't have the ability to tell them they can't serve snacks because the ordinance says they can which is what they described in 1999.

THE COURT: But some day if you wanted -- and I'm not suggesting that this township would do that, I think the township has been cooperative in terms of doing certain things, but, you know, you just kind of weigh it. And they're saying that some day, some new administration is going to say, wait a minute, you know, we don't like what you're doing here. You don't have a real use. You're supposed to be a bed and breakfast, and we're now going to literally enforce this ordinance, and literally it says in return for payment. So you're going to have to show us where you've gotten paid.

MR. FORREST: Well, your Honor, then -- if that happened, then the Court could ask the question: Is this a substantial burden on a religious exercise?

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There's no evidence that if we were doing it today it would be a substantial burden.

THE COURT: But the issue is -- as I say, I've gone both ways in preparing for today in terms of this case. The issue is: is not if or when, or something, it's how it exists today, what he can do today, what's your ability to do today.

MR. FORREST: No, no, under the escape clause we can fashion a remedy which we've done that says whatever they have identified as a substantial burden, we've eliminated.

MR. DAVIS: Your Honor -

MR. FORREST: And today, they can go and do exactly what they proposed in 1999 -

THE COURT: So why don't you just give them a variance then?

MR. FORREST: Because -

THE COURT: Then they would be happy. Just give them a variance that says you can have exactly what they ask for. Get their letter out. I remember -- you're right, I think it was limited to I forgot how many people. It was limited to I think four people, or whatever. Just grant their variance.

MR. FORREST: Your Honor, if we grant a variance and a nosey neighbor takes us to Washentaw Circuit Court,

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we lose because Michigan law of variances require for -- this would be a huge variance, requires that the property can be put to no productive use without a variance, and we know that's not true because it's been used as a single-family home, later proposed as a golf course.

So the concept that we violate Michigan law just because they don't like the label "bed and breakfast" --

THE COURT: Michigan law says it can't be put to any other kind of use?

MR. FORREST: That's for a use variance, your Honor. For a dimension variance which is, you know, less than a side yard, all you need is practical difficulty.

THE COURT: But for use -

MR. FORREST: For a use variance you must show that under current going, the property cannot be put to any viable economic use.

THE COURT: And under current zoning a bed and breakfast is -

MR. FORREST: Well, under the current zoning it's a single-family residential which is as viable -

THE COURT: But you gave them a variance for a bed and breakfast.

MR. FORREST: We gave them what's called a conditional use permit, your Honor.

THE COURT: Oh, how about conditional use permit

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for a retreat?

MR. FORREST: The ordinance -- as written doesn't identify use because -- to be candid, your Honor, no one has ever suggested to the township until this case that they wanted to have a retreat house.

Now, for all we know, people have had retreat houses of this sort for years, it just never came on our radar screen.

But think about it, your Honor, of the multitude of uses that people come up with you can't identify everyone in a zoning ordinance.

THE COURT: I agree.

MR. FORREST: You just can't.

MR. DAVIS: Your Honor, with respect to this –

THE COURT: The issue is now here. I remember when I was a municipal attorney when they first came out gas. I mean, would you ever think of getting gas not self-service any more and there's a reason for it. And three cities that I represented had ordinances that said you couldn't self-serve. The reason was because of the fire -- you know. And they came out and -- you know, whoever thought there ever be self-service gas stations. And I remember -- sometimes you have to change ordinance to keep up with what's happening in the community.

MR. DAVIS: Your Honor, I submitted to you in the

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papers the legislative history of this particular law.

THE COURT: I'm ready to rule.

But I don't think there's a substantial burden, but I don't think bed and breakfast is a fair characterization for what happened –

MR. DAVIS: We don't want any commercial burden, Judge.

THE COURT: and what we're doing is -- all I would be doing, would be ruling to -- for the sake of ruling, but not out of candidness. As I say I don't believe that a bed and

breakfast definition would be a substantial burden, but it also is a substantial burden because of the fact it's not what's going on over there, and it's not being honest and the kinds of things that all of us want to do in doing so. And I think the way to resolve the problem is as I say, I have to grant the motion of the plaintiff in this particular matter with the understanding that the township somewhere down the line will come up with an ordinance that will resolve this particular problem.

MR. FORREST: Your Honor, you're granting their motion for summary judgment?

THE COURT: Their motion.

MR. FORREST: The plaintiffs?

THE COURT: I don't know where that puts them.

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As I say I'm not sure I'm doing them a favor because if I grant their motion for summary judgment, it doesn't put them anywhere anyhow.

MR. FORREST: Your Honor is making a finding that there's no disputed issue of fact that there is a substantial burden on the DiLauras' religious exercise?

THE COURT: Under the caption of bed and breakfast.

I think the caption of bed and breakfast in and of itself – I mean, if you want a trial, I'd be more than glad to give you a trial on it.

MR. FORREST: By that label -- do you think that label violates RLUIPA?

THE COURT: I think so.

By labeling this as a bed and breakfast and the fact that you have to have payment in return. And I understand your argument, and I agree with you, and I know that the township is never going to enforce that, but it's still on the books that they have to accept payment, that they have to do certain kinds of things.

MR. FORREST: So is your Honor going to issue some sort of injunction?

MR. DAVIS: You Honor, we would simply want an injunction. Let me –

THE COURT: I'm not going to give you any kind of

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injunction. All I'm going to do is at this point -- I guess they can continue to do it until the township comes up with an ordinance.

MR. DAVIS: Well, your Honor, in our prayer for relief, we've asked that you grant our motion which you're going to.

We just want -- we want an injunction that just says don't use any ordinance that you have in contravention of our –

THE COURT: I'm not -- the reason I'm not going to issue an injunction because the relief that you're asking for in effect

is them not enforcing their ordinance. I'm going to grant that. That's your motion for summary judgment.

MR. DAVIS: That they not enforce their ordinance.

THE COURT: At this time. They can have another ordinance that they can push -- and the reason I'm not going to grant any kind of injunction telling them they can't do this, or they can't do that, because I think that the test is a substantial burden, okay.

But I also think there's another test. I think the township owes a duty both to the other citizens of that community as well as to anybody that may come to this particular location to -- for basic kinds of protection,

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you know, to make sure there's a fire extinguisher. And I suspect they're going to issue -- I don't know if -- I'm not suggesting they do because I don't care if they do, if you had never filed your suit we wouldn't have been here, nobody would have been here. You would have been operating your retreat. Nobody would have said anything and probably they would have -- maybe even have gotten an award in the community one day for assistance.

MR. DAVIS: Your Honor -

THE COURT: You know, who knows.

But at this point all I'm saying is that they can't enforce that.

MR. DAVIS: And this Court will issue an order?

THE COURT: We'll issue that.

MR. DAVIS: We would like to expressly reserve on the record our right to submit papers and have a hearing on legal fees.

THE COURT: Sure, you can always do that.

MR. DAVIS: Thank you, your Honor.

MR. FORREST: Your Honor, I think I'm entitled to some findings by the Court that there's no genuine issue, that there's a substantial burden which is the first step of any RLUIPA analysis because I think we'll back in Cincinnati. With all deference to your Honor I don't think there's anything in the record that supports the finding

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that there's a substantial burden on anyone's religious exercise.

I understand your Honor's concern with the label we've placed, but I think –

THE COURT: Okay –

MR. FORREST: -- before your Honor rules we need a finding or a decision that there's no genuine issue of fact; that there's been a substantial burden on the religious exercise of the DiLauras –

THE COURT: I think -- starting number one, is the fact that your papers say we don't enforce it and so forth, that there is a specific requirement that there must be a fee -- there

must be payment. And I think payment is held to be a substantial burden on any religious activity if you have to pay in order to become -- to be part of a religious activity whether it be a retreat, whether it be worship, whether it be whatever it is, I think that's a substantial burden in and of itself. I don't think I have to go any further than that because -- and, again, I understand your papers, your papers say we're not going to enforce it and I know you're not, you know, in good faith and so forth. But I have to look at what it says and take it exactly what you could do. You may not be the city attorney, they may get somebody else. They may get a new supervisor out there, or some citizen can say wait a

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minute, you're not enforcing the ordinance.

So just the mere fact that the ordinance requires that there must a fee or must be a payment in return for allowing people to utilize the sleeping rooms and so forth, I think in and of itself I think without going any further, is a substantial burden.

Now, I don't believe under any circumstances that there's a substantial burden to follow the law in terms of fire and things like that. But I think if you go no further than that, it's a substantial burden.

MR. FORREST: Very well.

MR. DAVIS: Will we be getting some sort of declaratory judgment?

THE COURT: I'm not exactly sure how we'll do it. We'll put something together. But it won't be an injunction because

that will -- I don't think it reaches that level at this point for extraordinary injunctive relief.

Okay, anything else?

MR. DAVIS: Thank you, your Honor.

We thank the Court for its time.

THE COURT: Sure, thank you.

(Proceedings concluded.)

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CERTIFICATE

I, JOAN L. MORGAN, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within entitled and number cause of the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Joan L. Morgan
JOAN L. MORGAN, CSR
Official Court Reporter
Detroit, Michigan 48226

Date: April 30, 2003

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 00-70570

[Filed April 11, 2003]

DILAURA, et al., Plaintiffs,	)
v.	)
ANN ARBOR TOWNSHIP, et al., Defendants.	)

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 9, 2003 the plaintiffs' and the defendants' motions for summary judgment came before the Court. A hearing was held and oral arguments were heard. For the reasons stated on the record, and in accordance with the terms stated on the record,

IT IS ORDERED that the plaintiffs' motion for summary judgment is granted.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment is denied.

/s/
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: APR 11 2003
Detroit, Michigan

Copy Mailed This Date To:

Robert L. Bunting, Esq.
James J. Walsh, Esq.
Sandra L. Sorini, Esq.
Robert Charles Davis, Esq.
William B. Forrest, Esq.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 00-70570

[Filed April 15, 2003]

DILAURA, et al.,
Plaintiffs,

v.

ANN ARBOR CHARTER TOWNSHIP, et al.,
Defendants.

JUDGMENT

The court has issued an order granting the plaintiffs' motion for summary judgment.

Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants. Costs to be permitted in accordance with law.

DAVID J. WEAVER
CLERK OF COURT

By:/s/_____
Deputy Clerk

Approved: /s/_____
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APR 15 2003

Copy Mailed This Date To:

Robert L. Bunting, Esq.
James J. Walsh, Esq.
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APPENDIX G

CHARTER TOWNSHIP OF ANN ARBOR
BOARD OF TRUSTEES

WASHTENAW COUNTY, MICHIGAN

RESOLUTION OF APPROVAL OF
CONDITIONAL USE PERMIT

DECEMBER 16, 2002

Resolution adopted at a regular meeting of the Board of Trustees of the Charter Township of Ann Arbor, Washtenaw County, Michigan, held at the Township Hall, 3792 Pontiac Trail, Ann Arbor, Michigan, on December 16, 2002.

PRESENT: Della DiPietro, Virginia Forshee, John Allison, Michael Moran, Gene Ragland, Richard Dieterle and Catherine Braun

ABSENT: None

Motion by Trustee Allison, supported by Trustee Ragland.

1. **FINDINGS**

1.1. Tim DiLaura ("Applicant") filed with the Township an application for a variance with the Zoning Board of Appeals for use of 4901 Dixboro Road, Ann Arbor Township, Michigan, parcel code no. 09-01-100-004 ("Property"), where Mr. DiLaura and his wife would reside,

for housing 2-3 overnight guests during the week and up to 5 overnight guests on weekends ("Application"). D.F. Land Development as the owner of the Property authorized the Application.

1.2. The Applicant subsequently filed a complaint in the United States District Court pertaining to the Application and proposed use of the Property for housing overnight guests.

1.3. The use of the Property proposed by the Applicant qualifies as a Bed and Breakfast operation under Section 11.24 of the Township Zoning Ordinance as follows:

1.3.1 The Property consists of a single family detached dwelling unit of greater than 2000 sq. ft. which will be the principal residence of the DiLauras.

1.3.2 The Property will be used for housing of no more than 6 transient overnight guests with sufficient off street parking, bathing facilities, and simple food service provided from the residential kitchen.

1.4. The Property is located in the Township's Agricultural district which allows Bed and Breakfast operations as a Conditional Use.

1.5. The Planning Commission held a public hearing on December 2, 2002 for consideration of a Conditional Use Permit for a Bed and Breakfast at the Property and found that that proposed use of the Property meets the standards of the zoning ordinance as a Conditional Use as follows:

1.5.1 Housing of up to 6 overnight guests will not unduly burden existing or future neighboring uses,

and will be compatible with the General Development Plan and existing and future uses in the vicinity.

1.5.2 The proposed use will be adequately served by essential public services, and access and parking facilities are sufficient for the number of guests proposed.

1.5.3 The proposed use will not create additional requirements for public facilities and will not be detrimental to the economic welfare of the community.

1.6. After the public hearing the Planning Commission adopted a resolution recommending approval by the Township Board of a Conditional Use Permit for the Property as a Bed and Breakfast operation for up to 6 transient overnight guests in addition to the resident operators.

1.7. The Planning Commission recommended that such approval be conditioned on the following: In the event a Conditional Use Permit Agreement is executed for use of the adjacent property as a golf course, or if construction of the golf course commences, or if the Property is otherwise developed for a different use, then the Bed and Breakfast operation of the Property shall cease and this Permit shall be deemed revoked.

1.8. By law the proposed use of the Property must comply with State Construction Code Section 125.1504b which requires a smoke detector in proper working order in each sleeping room and a fire extinguisher in proper working order on each floor.

2. **RESOLUTION**

BE IT RESOLVED:

Township Board approves issuance of a Conditional Use Permit for use of the Property as a Bed and Breakfast operation for up to 6 transient overnight guests in addition to the resident operators.

Provided, however, such approval is conditioned on the following: In the event a Conditional Use Permit Agreement is executed for use of the adjacent property as a golf course, or if construction of the golf course commences, or if the Property is otherwise developed for a different use, then the Bed and Breakfast operation of the Property shall cease and this Permit shall be deemed revoked.

AYES: Delia DiPietro, Virginia Forshee, John Allison, Michael Moran, Gene Ragland, Richard Dieterle and Catherine Braun

NAYES: None

ABSTAIN: None

RESOLUTION DECLARED ADOPTED.

/s/
Michael Moran, Ann Arbor Charter Township Supervisor

I certify that the foregoing is a true and complete copy of a resolution adopted by the Board of Trustees of the Charter Township of Ann Arbor, County of Washtenaw, State of

Michigan, at a special meeting held on December 16, 2002, that said meeting was conducted and public notice of said meeting was given pursuant to and in full compliance with the Open Meetings Act, being Act 267, Public Acts of Michigan, 1976, and that the minutes of said meeting were kept and will be or have been made available as required by said Act.

/s/_____
Catherine A. Braun, Township Clerk

Dated:_____,2002

APPENDIX H

42 U.S.C. § 1988. Proceedings in vindication of civil rights

* * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 2000cc. Protection of land use as religious exercise.

(a) Substantial burdens

(1) General rule.

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution --

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which -

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use

regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

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